

IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1942.**

**No. 881.**

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In the Matter  
of the

Petition of **KABUSHIKI KAISHA KAWASAKI ZOSENJO**, Owner,  
and **KAWASAKI KISEN**; **KABUSHIKI KAISHA**, Bareboat  
Charterer of the steamship "VENICE MARU", for Exon-  
eration from and Limitation of Liability.

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**CONSUMERS IMPORT CO., INC., et al.,**  
*Cargo Claimants-Petitioners.*

**KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI  
KISEN KABUSHIKI KAISHA,**  
*Respondents.*

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**REPLY BRIEF ON BEHALF OF PETITIONERS.**

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**D. ROGER ENGELAR,  
T. CATESBY JONES,  
EZRA G. BENEDICT FOX,  
THOMAS H. MIDDLETON,**  
*Proctors for Petitioners.*

April 24, 1943.

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For reasons of their own, respondents do not deal with the questions presented in the petition, either in the form or the order as they are there submitted. Respondents have elected to state the issues in the form of Propositions A-D (Respondents' Brief, p. 7), which they attempt to answer under their Points I-IV (Respondents' Brief, pp. 8, 17, 21, 26).

At page 9 of their brief respondents quote the first and third sections of the Act of March 3, 1851. As to the difference between these two sections, we refer to the statement of this Court in *Providence, etc., Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 602, where this Court pointed out that under the first section the exemption is

total, whereas under the third section the exemption is partial, but that under the first section the shipowner must show more than under the third section to bring himself within the exemption.

At page 10 of their brief, respondents attempt to make capital of the fact that the Circuit Court of Appeals for the Fourth Circuit in *Charbonnier, et al. v. United States*, 45 F. (2d) 174, did not comment on the ruling of the District Court in that case as to the burden of proof. That point, however, was not involved on the appeal. They attempt to spell out an approval of the District Court's ruling on the point by the following abbreviated quotation from the Circuit Court of Appeals' opinion: "The exhaustive and painstaking opinion of the District Judge in these cases \* \* \* correctly sets out the issue \* \* \*". The full quotation is: "The exhaustive and painstaking opinion of the District Judge in these cases contains the following statement which correctly sets out the issues and salient facts involved in the controversy: \* \* \*". (45 F. (2d) at p. 175). There then follow extracts from the District Court's opinion dealing with the facts of the case, but it is noteworthy that there is not a single line in the extracts dealing with the question of burden of proof.

On the next page of their brief (p. 11), respondents assert that "petitioners have misquoted (petition, p. 15) a portion of this Court's opinion in *Walker Transportation Co.*, 3 Wall. 150, 153" and then purport to set forth "the exact words employed by Mr. Justice Miller". We have again examined Mr. Justice Miller's opinion in the official report, 3 Wall. 150, and we find our quotation to be exactly as contained in the official report but that the language used in the alleged quotation on page 11

of respondents' brief, with the exception of the last sentence thereof, does not appear in the official report of that opinion. This matter is important because, Mr. Justice Miller made it clear that the exemption or exception of fire was a qualified one. As the House of Lords said in *Lennard's Carrying Co., Ltd., v. Asiatic Petroleum Company*, (1915) A. C. 705, 715-716, a shipowner who desires the benefit of a statutory exemption must bring himself fully within its terms. See particularly page 16 of the petition and our brief at pages 34-36.

At page 23 respondents attempt to negative the conflict between *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, (C. C. A. 9) and the case at bar. In addition to our discussion of this case at page 9 of the petition, we might also point out that Captain Fegen had previously laid out in a like manner the stowage of the "Getsuyo Maru" on which there was overheating (R. 2042-3). Furthermore, both ships were stowed at Kobe where the head office of the "K" Line was located. Mr. Okubo was, therefore, charged with knowledge as to such conditions. *Christopher v. Gruchy*, 40 F. (2d) 8 (C. C. A. 1); *The Glenbogie*, 81 F. (2d) 441, (C. C. A. 6).

Twice in their brief (at page 7 and at page 28) respondents make the statement that there had been only five cases of overheating "out of 112 previous voyages". This assertion is misleading in two respects: (1) it fails to differentiate between the much shorter voyage from Japan to United States Pacific Coast ports as compared with the longer voyage here involved from Kobe to Atlantic ports via Los Angeles and the Panama Canal; and (2) it fails to take into account the very material difference between the carriage of small quantities of sardine meal and the carriage of large quantities. Both courts below found the respondents negligent for carrying such

a large quantity stowed in the manner found by them. The "K" Line was aware of this fact through its own experience. It was found below that all cases of overheating occurred on "K" Line vessels which carried large quantities of sardine meal and after these vessels had left Los Angeles on the way to the Atlantic Coast (R. 631; Finding 22, R. 1984).

Of the 112 voyages cited by respondents, only 25 were to the United States Atlantic Coast and the quantity carried on some of these 25 voyages was very small (Ex. 42, R. 1961). In point of fact, as is shown by Respondents' own List (Ex. 42, R. 1961), there had been, prior to this voyage of the "Venice Maru", only 12 "K" Line ships sailing from Japan carrying as much as 1,000 tons of sardine meal to Atlantic Coast ports. On six of these, there was overheating (R. 40) and there had also been overheating on one other vessel (the "Tohsei Maru") which carried less than 1,000 tons (R. 625). In other words, the mortality rate was 50% where attempts were made to carry as much as 1,000 tons from Japan to the Atlantic Coast. The total which the "K" Line contracted to carry on the "Venice Maru" was 38,000 bags or 1,900 tons (Finding 5, R. 1981).

We have refrained from imposing on the Court's time to answer the whole of respondents' brief, but we felt that at least the foregoing inaccuracies should be called to the attention of the Court.

Respectfully submitted,

D. ROGER ENGLAR,  
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April 24, 1943.